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THE ROLE OF THE UNITED NATIONS IN THE FORMATION OF CUSTOMARY INTERNATIONAL LAW IN THE FIELD OF HUMAN RIGHTS

*Sufyan Droubi**

ABSTRACT

The present work addresses the role of UN in the formation of customary international law from a constructivist perspective. It dialogues with the International Law Commission and, in contrast with the latter, it argues that the importance of the UN is a matter to be defined empirically. Its organs are capable of acting as norm entrepreneurs, articulating and promoting new norms. They are capable of affecting social processes in order to create pressure on the states that resist emergent norms. Thus, instead of a mere agent of states the UN is capable of deeply influencing them both in behavioural and attitudinal terms. Furthermore, the UN promote the formalization and institutionalization of new norms, elucidating their scope, application, and embedding them in consistently coherent amalgamation of norms and practices. Hence, it is capable of fostering the processes that lead to the crystallization of norms as customary international law.

KEYWORDS

United Nations; Customary International Law; Constructivism

1. INTRODUCTION

Customary international law (hereunder CIL) has never ceased to attract the attention of international lawyers.¹ Since 2012, the topic of its *identification* is back on the International Law Commission's (ILC) programme of work, under the rapporteurship of Sir Michael Wood (SR). The ILC began by affirming that practice and *opinio juris* of states are relevant for the ascertainment of rules of CIL.² The work combines state-

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¹ See e.g. International Law Association, 'Final Report of the Committee on the Formation of Customary (General) International Law', *Statement of Principles Applicable to the Formation of General Customary International Law, Report of the Sixty-Ninth Conference, London* (2000) (hereunder the London Statement); International Committee of the Red Cross, 'Study on Customary International Humanitarian Law' (ICRC, 2007) 30IC/07/ 8.3.

² ILC 'Identification of Customary International Law: text of the Draft conclusions provisionally adopted by the Drafting Committee. A/CN.4/L.872' (UN, 2016) (hereinafter, 'Draft conclusions'). Draft conclusions: 2[3]. 'Two

centrism with significant caution towards non-state actors in general and international organizations in particular.³ The state is emphatically qualified as the *primary* actor in the international sphere and is approached as a unitary entity, whose behaviour and attitude should be coherent, lest it be held less relevant in the ascertainment of the existence of customary law.⁴ International organizations, including the UN, play either an instrumental role, by providing arenas that facilitate the role of states, or a residual one, in which their practice is relevant qua practice of an independent legal person.⁵ Their importance is established on normative grounds: because states ‘create and control international organizations’, empowering them to ‘perform, as separate legal persons, a variety of functions [it is] premature to equate such normative power [that organizations hold] with *genuinely* autonomous law-making power’ (my italics).⁶ Consequently, resolutions of international organizations, notably resolutions of the UN General Assembly, are addressed essentially on whether they reflect the practice of states.⁷ Accordingly, there is an attempt to draw a clear distinction between practice of the organization, and practice of the states within the organization.⁸ Moreover, the work is markedly formal, notably in sharply distinguishing between *lex lata* and *lege ferenda*,⁹ and in differentiating between customary law of an organization and customary law of the international community.¹⁰

The present work addresses the role of international organisations, and of the UN in particular, in the *formation* of CIL. In contrast with the ILC, I ascribe a greater role to the UN, arguing that its importance is a matter to be defined empirically on a case-by-case basis. Instead of a mere agent of states, I argue that the UN is capable of deeply influencing them both in behavioural and attitudinal terms. Indeed, I argue that its organs and procedures are capable of acting as *norm entrepreneurs*, i.e., capable of articulating new norms, introducing them to the international community, and promoting them. In addition, UN organs are capable of affecting social processes in

constituent elements. ‘To determine the existence and content of a rule of customary international law, it is necessary to ascertain whether there is a general practice that is accepted as law (*opinio juris*)’.

³ ILC Draft conclusions: 4[5] ‘*Requirement of practice.* 1 ... it is primarily the practice of States that contributes to the formation, or expression, of rules of customary international law. 2. In certain cases, the practice of international organizations also contributes to the formation... 3. Conduct of other actors is not practice ... but may be relevant when assessing the practice...’.

⁴ ILC Draft conclusions: 7[8] 2 ‘*Assessing a State’s practice.* Where the practice of a particular State varies, the weight to be given to that practice may be reduced’.

⁵ ILC Draft conclusions: 4[5] 2 (transcribed above in footnote 3).

⁶ Michael Wood ‘Third Report on Identification of Customary International Law. A/CN.4/68270’ (New York, UN 2015), para. 70. Also Michael Wood, ‘International Organizations and Customary International Law’, *Vand. J. Transnat’l L.* 48 (2015) pp. 613–4.

⁷ ILC Draft conclusions: 12[13] 3 ‘A provision in a resolution adopted by an international organization ... may reflect a rule of customary international law if it is established that the provision corresponds to a general practice that is accepted as law (*opinio juris*)’.

⁸ Michael Wood, ‘Second Report on Identification of Customary International Law’ (New York, UN 2014), para. 71. (‘...the practice of international organizations, as separate international legal persons should not be assimilated to that of the States themselves...The present report ... proceeds on the basis of the determination that, where appropriate, the practice of States within international organizations is to be attributed to States themselves’).

⁹ ILC, Draft conclusions: 15[16] 1 ‘*Persistent Objector.* Where a State has objected to a rule of customary international law while that rule was in the process of formation, the rule is not opposable to the State concerned for so long as it maintains its objection’. Wood, ‘Third Report on Identification of Customary International Law’ para. 28 and 65. Wood, ‘International Organizations and Customary International Law’, p. 616.

¹⁰ Wood, ‘Third Report on Identification of Customary International Law’, para. 72 and footnote 172.

order to create pressure on the states that resist an emergent norm, which I shall refer to as *recalcitrant* states in order to differentiate between them and states that are the first to adopt the new norm, which may in turn be referred to as *leading* states. Consequently, through *active socialization*, UN organs are capable of seriously affecting the material behaviour of the state – and the manner that the latter defines itself and its interests – in respect to the new norm. Besides, the UN promotes the *formalization* and *institutionalization* of the new norm, by elucidating its scope, application, and embedding it in a consistently coherent amalgamation of norms and practices (institutions). As the above suggests, I make a distinction between norm and the behaviour and attitude that supports it. In the text, the word *norm* is employed indistinctively from *rule* and both refer to a prescriptive statement of more restrict (rule proper) or more general (principle) character.

Although the emphasis in this study is placed on international human rights law, the present approach and many of the conclusions reached hereunder are intended to be applicable, *mutatis mutandis*, to other fields of international law. I adopt an interdisciplinary approach that draws on methods and instruments that reverberate with the international relations (IR) constructivism school.¹¹ From the legal standpoint, the approach broadly matches the Hartian school of thought in defining law as a social construct.¹² This interdisciplinary analysis brings new light to the role of the UN in such processes.

The article proceeds as follows. Section 2 provides an overview of the IR literature on the life cycle of international norms, and starts building the links between international norms and norms of CIL by approaching both as social norms. Section 3 addresses norms of CIL: it concludes the bridging of the concepts and applies the theory developed in Section 2 to the study of the development of norms of CIL. Section 4 describes the main instruments available for the UN to promote a norm as a law (notably, CIL) at the different junctures of its life. Section 5 contains a case study whose purpose is merely illustrative. Section 6 concludes and provides prospects for future research.

¹¹ Alexander Wendt, 'Collective identity formation and the international state' *American political science review* (1994) p. 384. Ann Florini, 'The evolution of international norms' 40 *International Studies Quarterly* (1996) p. 363. Martha Finnemore and Kathryn Sikkink, 'International norm dynamics and political change' 52 *International organization* (1998) p. 887. Jeffrey T Checkel, 'The constructive turn in international relations theory' 50 *World politics* (1998) p. 324.

¹² H.L.A. Hart and others, *The Concept of Law* (OUP Oxford 2012); Leslie Green, 'Introduction' in Ibid; Leslie Green, 'The concept of law revisited' 94:6 *Michigan Law Review* (1996) pp. 1687-1717; Jean D'Aspremont, *Herbert Hart in Post-Modern International Legal Scholarship* (2012).

2. SETTLING THE GROUNDS OF THE WORK: INTERNATIONAL NORMS, DEFINITION AND LIFE-CYCLE

The IR literature struggles with different concepts of an international norm.¹³ I adopt the sociological oriented definition of norm prevalent in the constructivist literature, which posits that an international norm is ‘a standard of appropriate behaviour for actors with a given identity’.¹⁴ This definition emphasises *appropriateness* and relates it to a specific *identity*. Further, implicit in the definition is the notion that one only knows what is appropriate by reference to the normative and ideational dimensions of a community.¹⁵ Besides, the definition differentiates between the norm and the behaviour that it commands or empowers, which permits the ascertainment of the effect of the former on the latter.¹⁶ Finally, it helps in the transition to the definition of a norm of CIL, as becomes clear in the next Section.

Martha Finnemore and Kathryn Sikkink wrote one of the most cited works in the international relations constructivist literature, which also contains the most compelling description of the life cycles of international norms. They identify three distinctive stages, namely, emergence, cascade, and internalization.¹⁷

The first stage, emergence, begins with the rising of the new norm. They acknowledge that norms may appear out of ‘chance occurrences’,¹⁸ but emphasise cases in which norms are ‘actively built by agents having strong notions about appropriate ... behaviour in their communities’.¹⁹ They argue that the role of entrepreneurs seems greater at the early stages of the emergence of an international norm. These are agents whose methods are often very sophisticated and rational, and who make ‘means-ends calculations’ in order to change the way that their targets (in the present case, states and international organizations) see themselves and their interests.²⁰ To that purpose, they define problems, frame the range of acceptable solutions, identify the main actors, articulate new norms and promote them. They aim at persuading their targets that the emerging norm requires an appropriate, legitimate behaviour and that complying with the norm is in their interest.²¹ It is important to note that the role of norm-entrepreneurs becomes significant within a constructivist framework. This is so because constructivism assumes that identities are learned through the social processes. Because the identities of states change, their interests also change.²² Hence, entrepreneurs try to

¹³ Annika Björkdahl, ‘Norms in international relations: Some conceptual and methodological reflections’ 15 Cambridge Review of International Affairs (2002) p. 9

¹⁴ Finnemore and Sikkink, ‘International norm dynamics and political change’; Peter J Katzenstein, *The culture of national security: Norms and identity in world politics* (Columbia University Press 1996) p. 42.

¹⁵ See generally Finnemore and Sikkink, ‘International norm dynamics and political change’. See footnote 130, below, and accompanying text.

¹⁶ Ibid.

¹⁷ Finnemore and Sikkink, ‘International Norm Dynamics and Political Change’.

¹⁸ Finnemore and Sikkink, ‘International norm dynamics and political change’ p. 896.

¹⁹ Ibid.

²⁰ Ibid. p.910.

²¹ Note that the norm truly arises as the community begin to share the understanding that the new standards are in fact appropriate. It is beyond the present scope to ascertain when such moment occurs.

²² Christian Reus-Smit, *The politics of international law*, 96 Cambridge University Press (2004) chap. 1.

focus their targets' attention on certain issues or even create new issues.²³ They do this by working on the meaning of those issues, framing them in a manner that resonates with the existing understandings shared by their targets – although they can and often do challenge those understandings.²⁴

Emphasising the emerging norm may affect the manner in which states identify themselves and define their interests.²⁵ As Richard Price explains, there *is* a recursive effect of the emerging norm on the states.²⁶ It is often the case that norm-entrepreneurs promote the new norm using mechanisms of persuasion. As the leading states become convinced that a norm matches their ethical expectations and their interests, they may adapt their behaviour to comply with the norm. This in turn, strengthens the emerging norm and creates social pressure on other states to conform their behaviour to the new norm. At this moment, a caveat becomes necessary. The articulation and promotion of the norm may be a product of a rational, deliberate decision — however, the generation of CIL continues to be spontaneous and unintentional. It will depend on how deep the processes of articulation and promotion of new norms affect the behaviour and attitude of the States towards the norm.

Finnemore and Sikkink claim that, once norm entrepreneurs have persuaded a critical mass of actors to adopt the new norm, adoption by followers often cascades down.²⁷ Once this 'tipping point' has been reached, the rationale changes significantly. Other mechanisms come to play a relevant role in moving recalcitrant states to adopt the norm, namely, material rewards, sanctions, and socialization, which is of most interest here. The two authors highlight 'active socialization' as the primary mechanism in norm cascade.²⁸ They argue that empirical studies in different fields of international law suggest that social pressure leads target states to adopt a norm because they seek international legitimacy or wish to demonstrate that they belong to a community with a certain identity (e.g. liberal states).²⁹ Once a number of states has adopted the norm, socialization creates increasing pressure on other states and often causes them to adapt their behaviour vis-à-vis the norm. This may occur irrespective of the conviction of states as to whether the norm is legitimate or even promotes their interests. Once adopted by a state, i.e., once the state has adapted its behaviour to comply with the norm, I argue that the state will continue to comply with it, pursuant to the principle of inertia.³⁰ Furthermore, the norm may trigger different processes that progressively

²³ Finnemore and Sikkink, "International Norm Dynamics and Political Change," p. 897.

²⁴ Ibid.

²⁵ Antje Wiener, "The Dual Quality of Norms and Governance beyond the State: Sociological and Normative Approaches to 'Interaction,'" 10:1 *Critical Review of International Social and Political Philosophy* (2007) p. 47–69.

²⁶ Richard Price, 'Emerging Customary Norms and Anti-Personnel Landmines' in Christian Reus-Smit (ed.), *The Politics of International Law* (2004). Contrast with Eric Posner and Jack L. Goldsmith, 'Understanding the Resemblance between Modern and Traditional Customary International Law', 40 *Virginia Journal of International Law* (2000), pp. 639, 641 and 662.

²⁷ Finnemore and Sikkink, 'International Norm Dynamics and Political Change' p. 901.

²⁸ Ibid. p. 902.

²⁹ Ibid; Ryan Goodman and Derek Jinks, *Socializing states: Promoting human rights through international law* (Oxford University Press, 2013) pp. 307–14.

³⁰ Chaim Perelman, *The New Rhetoric* (Springer, 1971) pp. 105–7. (On the 'principle of inertia' which allows one to assume that once adopted, the behaviour will continue to be adopted, because change will require justification).

create within organs and institutions of the state the conviction of appropriateness, of obligation or conformance with their interests.³¹

Further, the authors note that it is often the case that emergent norms are institutionalized before they reach the cascade stage.³² They note that ‘since 1948 emergent norms have increasingly become institutionalized in international law, in rules of multilateral organizations, and in bilateral agreements’.³³ They also argue that the institutionalization process often clarifies the scope of the norm, the precise meaning of violations, and the sanctioning process for violators. I submit that the manner that the norm is institutionalised paves the way for it to acquire customary law status and, consequently, that it is at the stage of institutionalisation that the norm is most likely to be identified, for the first time, as CIL.³⁴

Finally, at the more mature stages of its life cycle, States take the norm for granted and comply with it without questioning its appropriateness. This is the stage of internalization, to which I come back later in the text.³⁵ As explained in the Introduction, the framework above may explain the formation of norms of CIL, and provide new avenues to explain how the UN and other organizations may affect the life cycle of the norm. The fundament for the application of the above theory to the emergence and development of CIL consists in that both international norms and norms of CIL may be defined as social norms. Besides, from the international relations point of view, a norm of CIL may be defined as an international norm that undergoes a certain type of specialisation: the norm that lawyers define, use and treat as CIL.³⁶ This definition emphasises that law – and CIL – is a social construct³⁷ and, notably, the construct of a specific community.³⁸ I submit that, as the international norm evolves, it may be referred to as a legal norm and, more to the point, as a norm of CIL – the next Section looks at the progressive shaping of a norm as CIL.

3. THE PROGRESSIVE CONSTRUCTION OF NORMS OF CUSTOMARY INTERNATIONAL LAW

The processes that Section 2 briefly describes are dynamic and encompass the movement from non-law to law: how social norms may progressively acquire the character of CIL. In order to describe this movement, a full genealogy of the norm may require the identification of the act that firstly articulated it as an international norm. The analysis may proceed with the description of the processes that led to the act that

³¹ Harold Hongju Koh, “Why Do Nations Obey International Law?” 106:8 *The Yale Law Journal* (1997) pp. 2599–2659; Harold Hongju Koh, “Internalization through Socialization,” *Duke Law Journal* (2005) pp. 975–82.

³² Finnemore and Sikkink, ‘International Norm Dynamics and Political Change’ p. 900.

³³ Ibid.

³⁴ See Sections 3, 4 and 5 below.

³⁵ See Subsection 3.4 below.

³⁶ Martha Finnemore, ‘Are legal norms distinctive’ 32 *NYUJ Int’l L & Pol* (1999) pp. 699 and 703 (‘Another possible reason why legal norms may be particularly powerful in world politics arises from professional norms and the fact that so many foreign policy makers now have legal training’)

³⁷ Hart and others, *The Concept of Law*; also Green ‘Introduction’ in *ibid*.

³⁸ Ibid.

first articulated the norm as CIL, to which I refer to as promulgative articulation, adopting the terminology coined by d'Amato.³⁹ This owes to the fact that compliance may acquire a legal connotation and non-compliance may require legal justification.

The movement from non-law to law is markedly fluid. Hence, it is difficult, if at all possible, to pinpoint the moment at which a customary legal norm emerges.⁴⁰ However, the determination of that moment is not of relevance here. Rather, I argue that the description of how certain norms are *progressively used* as legal norms provides evidence as to the norms in question acquiring legal character. The use of a norm as law – inclusive CIL – leaves traces of at least two types: high degrees of formalisation especially in terms of language and specific types of institutionalisation. As Onuf posits, 'prescriptive statements enjoying some degree of formality and institutional support are legal'.⁴¹ Similarly, Friederich Kratochwil argues that it is its *use* in a distinct manner that distinguishes law.⁴² As Kratochwil cogently demonstrates, the path of legal arguments has very distinctive characteristics. Notably, Kratochwil explains that legal reasoning is a subcategory of rhetorical and practical reasoning, which is marked inter alia by the characterization of actions as legal types with specialized topoi, which often provide the content of legal principles.⁴³ This leads to the question of what type of formalisation and institutionalisation provides evidence of CIL. I argue that this question can only be answered by looking at how international law professionals define CIL.

The mainstream definition of CIL is reflected in the work of the SR and the ICL. The SR suggested and the Commission agreed that the Conclusions resort to the language in Article 38 of the Statute of the International Court of Justice (ICJ), which allows that organ to apply 'international custom, as evidence of a general practice accepted as law'.⁴⁴ Nevertheless, I submit that the expression 'practice accepted as law' leads to mistakes and triggers confusions. I argue that both practice and *opinio* must support a norm for the latter to acquire the character of CIL.⁴⁵ The SR attempts to

³⁹ Anthony A. d'Amato, *The concept of custom in international law* (Cornell University Press 1971)

⁴⁰ See J Crawford, "The Identification and Development of Customary International Law" p. 11. ('...it is nearly impossible to identify with precision the exact point in time the [customary international law rule] was created. The creation of customary international law is not momentary. It emanates from an "intensive dialectical process" between different actors of the international society'). Moreover, see Michael Wood, "Fourth Report on Identification of Customary International Law" para. 17 (responding to the delegations of some states, which, reacting to the work of the Commission, affirmed the difficulty 'that often arises in identifying the precise moment when a critical mass of practice accompanied by acceptance as law (*opinio juris*) has accumulated, and a rule of customary international law has thus come into being'. Wood noted that 'the draft conclusions seek to provide guidance as to whether, at a given moment, it may be said that such processes had occurred').

⁴¹ Nicholas Onuf, 'The constitution of international society' 5 *European Journal of International Law* (1994) p. 1.

⁴² Friedrich V. Kratochwil, *Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (Cambridge University Press, 1991).

⁴³ *Ibid.*, chap. 8.

⁴⁴ *Statute of the International Court of Justice, Treaty Series N. 293, 1945, article 38, 1, (b)*. The decision to rely on this provision of the Statute is questionable given the fact that this provision was poorly drafted. See Jean d'Aspremont, *The Decay of Modern Customary International Law in Spite of Scholarly Heroism*, SSRN Scholarly Paper. Rochester, NY: Social Science Research Network (2015).

⁴⁵ Lassa Oppenheim, *International Law: A Treatise. Vol. 1. Peace* (1905) p. 22–3. ('Wherever and as soon as a certain frequently adopted international conduct is considered legally necessary or legally right, the rule, *which may be abstracted from such a conduct*, is a rule of customary International Law'. My italics); László Blutman, "Conceptual Confusion and Methodological Deficiencies: Some Ways That Theories on Customary International Law Fail," 25:2 *European Journal of International Law* (2014) p. 535. ('State practice, as a practice-like phenomenon, does not

prevent any terminological problems by adopting the terms ‘customary international law’ and ‘rules of customary international law’.⁴⁶ However, because he resorts to the Statute language of ‘practice accepted as law’,⁴⁷ the terminology at times becomes obscure given the confusion of the material element with the legal norm.⁴⁸ In any case, this definition of norms of CIL – norms supported by the behaviour and *opinio* of a collective of States – suggests the type of formalisation and institutionalisation that provide cues as to the emergence of a norm. Among the types of formalisation, I underline that States may justify their behaviour in respect to the emergent norm; some of their organs may refer to the norm as law; they may invoke the norm before international courts and tribunals, which then face the challenge of ascertaining whether the norm is law. In this process, the norm becomes institutionalised, i.e., embedded in coherent systems of norms and practices. Certain types of institutionalisation occur within international organisations and, notably, within the UN: resolutions fix and clarify the norm and the operational activities strengthen it in practice.

The Section that follows describes in more detail how social norms progressively acquire the shape of CIL. I then examine the *opinio* and finally, at the ascertainment of norms of CIL.

3.1. The progressive construction of behaviour and *opinio*

With customary norms being dependent on behaviour, there seems to be an ontological paradox in defining as CIL a norm that faces widespread violations or ambivalent behaviour. Yet, this is frequently the case with emergent norms: compliance with it is inconsistent across the community and often within the individual state. However, this is a paradox only insofar as the behaviour is ascertained without regard to the attitude of states in respect to the norm. Richard Price posits that a violation will not be harmful to the norm if

the transgressor feels compelled to justify (or deny) the violation because of mutually shared expectations that such behaviour is normally unacceptable and requires defence to reconfirm the status of the violator as a legitimate member of international society.⁴⁹

That is reminiscent of, yet different from, the approach taken by the ICJ in *Nicaragua*.⁵⁰ The difference is that Price brings a new perspective when suggesting that the non-compliant behaviour in that specific context may in fact indicate that the norm is

take the form of a norm in itself. I am of the view that it is not state practice but, rather, the rule or regularity of which state practice is a manifestation that can be accepted as law’).

⁴⁶ ILC ‘Draft conclusions: 1 *Scope*. The present draft conclusions concern the way in which the existence and content of rules of customary international law are to be determined’.

⁴⁷ ILC ‘Draft conclusions: 2[3] (See footnote 2 above).

⁴⁸ In fact, the problem is more complex: ‘norm’ and ‘rule’ may be defined as referring to existing ‘uniform behaviour’. See Florini, ‘The evolution of international norms’; Green, ‘Introduction’.

⁴⁹ Price, ‘Emerging Customary Norms and Anti-Personnel Landmines’, 114.

⁵⁰ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, Judgment ICJ Reports 1986 para. 186.

transitioning from the realm of politics to that of law, because an emergent norm may require justification of the nonconforming behaviour.⁵¹ I argue that it may require a specific type of justification, i.e., justification in legal terms. Then, rather than assessing whether the practice of organs of one state is uniform in supporting the norm,⁵² the appropriate exercise for the ascertainment of the formation of a customary international legal rule requires an assessment of the reasons for actions taken by the different organs. In other words, there is a need to ascertain the *legal* reasons state organs put forward for justifying their behaviour in respect of the norm. In this sense, in contrast with both the SR and the Commission, I maintain that it is not appropriate to ascertain behaviour independently of attitude:⁵³ they should be approached as one and the same reality; and that the inconsistency in individual and collective behaviour and attitude should not, automatically, count as a negative factor. There may be trends in the individual and general behaviour and attitude that permit one to ascertain whether the norm is undergoing a process of strengthening or weakening.

Moreover, the strength of the emerging norm will vary pursuant to the stage of its life cycle and the context in which it is emerging. Often compliance by the leading states is likely to generate social pressure on other states. Accordingly, the adoption of the norm by a critical mass of states may *increase* the pressure on the recalcitrant states to adopt the norm qua customary law. Adoption of the norm refer to different phenomena – states may conform with the norm out of a belief that it is law, or they have a more nuanced attitude towards the norm, or even fail to adapt their behaviour but justify their non-conformance in legal terms. In fact, it is often the case that organs of both states and international organizations give in to socialization pressures and adopt the behaviour described by the norm without accepting that it is required under international law, but by providing justification in a legal language that paves the way of the norm acquiring that character.⁵⁴ Besides, highly politicised contexts may create overarching ‘pulls of obligation’,⁵⁵ which become more demanding as leading states and non-state actors increase pressure on recalcitrant states.⁵⁶ According to Price, politicization may ‘raise the threshold for violations, so much so that the burden of proof clearly is reversed in favour’ of the behaviour described in the norm.⁵⁷ Arguably in such circumstances, it becomes increasingly difficult for any given (organ of a) state or organization to justify its nonconforming behaviour with the emerging rule. Note that giving in to such pulls does not necessarily mean believing that the norm is CIL, which is the topic of the next Subsection.

⁵¹ Price, ‘Emerging Customary Norms and Anti-Personnel Landmines’ p. 114.

⁵² ILC, Draft conclusions: 7 [8] (footnote 4, above).

⁵³ ILC Draft conclusions: 3[4] (2) ‘Each element is to be separately ascertainment. This requires an assessment of evidence of each element’.

⁵⁴ Price, ‘Emerging Customary Norms and Anti-Personnel Landmines’ p. 124.

⁵⁵ Ibid.

⁵⁶ For instance, note how Scobbie describe the potential that social pressure may make it difficult for state to disregard the rules articulated by the ICRC. Iain GM Scobbie, “The Approach to International Customary Law in the Study,” in *Perspectives on the ICRC Study on Customary International Humanitarian Law*, ed. Elizabeth Wilmshurst and Susan Breau (Cambridge University Press, 2007) p. 21.

⁵⁷ Price, ‘Emerging Customary Norms and Anti-Personnel Landmines’ p. 123.

I argue that the processes described above may have a strong impact on the parameters of lawfulness and legitimacy, prevalent in the community, respecting the behaviour that the emerging norm regulates. Recalling Bruno Simma's well-known opinion in *Kosovo* regarding the degrees of non-prohibition,⁵⁸ I argue that behaviour not in conformance with the emerging norm may be accepted as 'not illegal' – and therefore may be tolerated – at the same time that it is refused to be assessed as 'legal'. At a certain point in this latter stage of the process of the emergence of the norm, an actor such as an international court hearing a case will be able to affirm that a customary international norm exists. The degree of persuasiveness of this affirmation will depend on the maturation of the processes described above. A premature affirmation will likely fail to persuade other (state and non-state) actors, as is shown by the finding by the Special Tribunal for Lebanon that a customary law on terrorism existed.⁵⁹

Note that, although the framework presented above explains that the first persuasive affirmation that an international customary international norm exists does not occur in fiat, it fails to solve one of the main problems in CIL: the lack of a reliable yardstick to differentiate between law and non-law.⁶⁰ In respect to CIL, the main yardstick is often identified with the element of *opinio*,⁶¹ which is the subject of the next Subsection.

3.2. The mental element in norms of customary international law

There has been much debate on the nature of *opinio*.⁶² Blutman argues that 'only by the help of the terms denoting some mental act or mental state (acceptance, *opinio juris*, consent, belief and so on) may one ascribe normative (legal) aspect to the (non-normative) regularity displayed in practice'.⁶³ Blutman also argues that 'it is crucial to properly single out the specific mental state or act that provides the best explanatory framework for the nature and operation of customary international law'.⁶⁴

However, I submit that it is difficult, if at all possible, to single out a 'specific mental state' at the stage of the emergence of the norm. Indeed, the International Law Association explains that 'once a customary rule has become established, States will

⁵⁸ *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* ICJ Reports 2010.

⁵⁹ UN Special Tribunal for Lebanon (Appeals Chamber) *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*, STL-11-01/I/AC/R176bis, 16 February 2011, para. 85 et seq. ('The conclusion is therefore warranted that a customary rule has evolved in the international community concerning terrorism'). For a critique of this finding, see Kai Ambos, 'Judicial Creativity at the Special Tribunal for Lebanon: Is There a Crime of Terrorism under International Law?', 24:3 *Leiden Journal of International Law* (2011) pp. 655–75; Ben Saul, 'Legislating from a Radical Hague: The United Nations Special Tribunal for Lebanon Invents an International Crime of Transnational Terrorism', 24:3 *Leiden Journal of International Law* (2011) pp. 677–700.

⁶⁰ d'Aspremont, 'The Decay of Modern Customary International Law in Spite of Scholarly Heroism' p. 16.

⁶¹ ILC Draft conclusions: 9[10].2 'A general practice that is accepted as law (*opinio juris*) is to be distinguished from mere usage or habit'.

⁶² László Blutman, 'Conceptual Confusion and Methodological Deficiencies: Some Ways that Theories on Customary International Law Fail' p. 538 (The author explores the differences between the definitions of *opinio*, most notably, between *opinio* as acceptance and as belief).

⁶³ *Ibid.*

⁶⁴ *Ibid.*

naturally have a belief in its existence: but this does not necessarily prove that the subjective element needs to be present during the formation of the rule'.⁶⁵ Likewise, Lachs submits that 'to postulate that all States, even those which initiate a given practice, believe themselves to be acting under a legal obligation is to resort to a fiction'.⁶⁶ More to the point, Kelsen notes that at the stage of formation of the norm, States 'need not believe that it is a legal norm which they apply'.⁶⁷ Hence, the formalistic model adopted that marks the work of the SR⁶⁸ does not provide a fair account of how *opinio* forms, or how it evolves at the stages when the norm in question is *not yet* a legal norm.

The search for a 'specific mental state', propelled by the feeling that both elements must necessarily be clearly distinguishable, has been and is likely to remain elusive. The reason is that different 'mental states' coexist in the community of States and even within the same State.⁶⁹ Most certainly, at the early stages on the life cycle of a norm, the mental element that predominates within the group of the leading States is an attitude towards the norm that sees it as appropriate: as broadly matching the legal and ideational structures of the community. In this respect, the existence of the different mental states is not a negative factor, because, as explained, it may indicate the transition of the norm to the 'legal realm'. Perhaps the term 'attitude', which I have been employing, describes, better than *opinio*, the phenomenon to which they both refer (the mental element). By definition, *attitude* is 'a mental position with regard to a fact or state'⁷⁰; 'a feeling or opinion about something or someone, or a way of behaving that is caused by this'⁷¹.

On the one hand, attitude depends on the individual and collective identities and interests of the States. On the other, within the community, the attitude of some States may shape that of others. Because the mainstream approach assumes that the identities and interests of the States are fixed, it fails to appreciate the depth at which the attitude of the community may change throughout the period of formation of a new norm. Wendt resorted to the concept of 'reflected appraisals' to explain one of the

⁶⁵ International Law Association, *Final Report of the Committee. Statement of the Principles Applicable to the Formation of General Customary International Law*, 2000) 7

⁶⁶ International Court of Justice, 'North Sea Continental Shelf, Judgment, ICJ Reports 1969 pp. 3, 231 (Dissenting Opinion of Judge Lachs). Contrast with Draft conclusion n.9 [10] ('1. The requirement, as a constituent element of customary international law, that the general practice be accepted as law (*opinio juris*) means that the practice in question must be undertaken with a sense of legal obligation').

⁶⁷ Hans Kelsen, *Principles of International Law* (The Lawbook Exchange, Ltd. 2003) p. 307. In his critique to Kelsen, d'Amato assumes that legal norms and social norms must be set perfectly apart and, resorting to Geny, he claims that it is *opinio* that sets them apart. See Anthony A. d'Amato, *The concept of custom in international law* (Cornell University Press 1971) 49.

⁶⁸ Michael Wood, *Second Report on Identification of Customary International Law*, 2014), para. 61 et seq.

⁶⁹ In order to ascertain the existence of different mental elements within the same State, there is the need to go beyond the 'billiard ball' model of the State, which assumes that, as a legal person, it is unitary. In reducing the weight of the *opinio* of a State in cases in which its different organs display different attitudes towards the norm of customary international law, Michael Wood adopts this model. The same model is adopted by much of the international relations scholarship, inclusive of the constructivist extract (for all, Alexander Wendt, 'The state as person in international theory' 30 *Review of International Studies* (2004) p. 289).

⁷⁰ Inc. Staff Merriam-Webster, *Merriam-Webster Dictionary* (Turtleback Books 2005)

⁷¹ E. Walter and Cambridge University Press, *Cambridge Advanced Learner's Dictionary* (Cambridge University Press 2005)

main processes that can occur in the socialization of States. Pursuant to Wendt, States 'form identities by learning, through interaction, to see themselves as others do' and 'the more significant these others are [...] the faster and deeper the process works'.⁷² Accordingly, the more important a leading State is to a recalcitrant State, the deeper the learning process becomes, as the recalcitrant State learns another identity, which leads it to redefine its interests and consequently change its *opinio* in respect of an emerging norm. In this context, the UN emerges as a player of weight in these processes. Because it is an autonomous social actor with legal capacity and political legitimacy, the UN is capable of affirming an emerging norm in its resolutions and procedures and, consequently, affecting the attitude of recalcitrant states.

3.3. The formal ascertainment of behaviour and *opinio*

From the sociological standpoint, it is possible to observe that the legal authority – a renowned publicist, an international organ, an international court or tribunal – may find it difficult to distinguish clearly between emerging and fully emerged norms of CIL. It is possible to see that the legal authority makes some decisions – which constitute politico-legal decisions – when ascertaining the existence of a given norm. In the making of such decisions, the authority enjoys a significant degree of autonomy. Evidently, the authority must ensure that decision-making follows the standards – which are politico-legal standards – accepted by the international legal community. In other words, the affirmation made by the authority that a rule of CIL exists, results from a politico-legal decision that relies on technical – as well as rhetorical – arguments. It is not a sociological ascertainment of the behaviour and attitude that is prevalent in the community of States. The authority makes the decision on standards accepted by the international legal community and the ILC Draft conclusions constitute an obvious example of these standards. Standards like these aim at securing an outcome that is capable of best reflecting the general behaviour and *opinio* of the States. However, the outcome does not need to pass the threshold of the *sociological* observation of the general practice and *opinio* in order to be *legally* valid. The authority often *infers* the *opinio* from the evidence it collects or that other actors submit to it; and *induces* the general behaviour in the community from the behaviour of certain States.⁷³

The review of the case law seems to corroborate this understanding. For instance, see how Judge Armand-Ugon concluded that the right to passage over Indian Territory was CIL.⁷⁴ There are three aspects of the argument put forward by Judge Armand-Ugon: one factual and two normative. First, there is the *fact* that Portugal enjoyed passage for long period in a peaceful manner. Second, there is the *principle* of effectiveness and, third, what the Judge calls the *principle*, but I should refer to as the legal *topos*, that ascertains 'that a state of things which actually exists and has existed for

⁷² Wendt, 'Collective identity formation and the international state' p. 390.

⁷³ See for instance, Crawford, *The Identification and Development of Customary International Law* (2014) (explaining the different manners employed by the ICJ to affirm the existence of customary international law).

⁷⁴ *Case concerning Right of Passage over Indian Territory (Merits)*, Judgment I.C.J. Reports 1960 p. 6.

a long time should be changed as little as possible'.⁷⁵ In any case, Judge Armand-Ugon *infers* that the States had a 'belief in *the respect* of the long established practice' and because of the belief that their shared, the right to passage 'acquires binding force and assumes the character of law'.⁷⁶

Consequently, two aspects become salient. On the one hand, the legal authority may define as CIL a clearly strong social norm, which counts with widespread behavioural and attitudinal support. This exercise matches the classic view of CIL, which focuses on the spontaneity of the processes of appearance and development of norms of CIL. However, on the other hand, a more complex process may also occur — and I argue that it has been occurring more often in the past decades given the growing participation of international organisations and other non-State actors in the production of international law.

This latter process is only visible if the legal scholar accepts the premise that not only behaviour and attitude generates a norm of CIL; but that also a norm, which is not CIL yet, may generate behaviour and shape attitude. In this latter process, the legal authority may affirm the existence of a norm of CIL that, in sociological terms, finds weak support in the general behaviour or attitude of the States. Recently, for instance, the Special Tribunal for Lebanon found that the prohibition of terrorism is CIL.⁷⁷ Legal theorists have been trying to address the imperfections in the 'findings' of CIL.⁷⁸ In these cases, the affirmation by the legal authority that a norm is CIL is likely to strengthen the norm as a social norm.

In brief, international norms and legal norms may be defined as social norms which underwent processes of specialisation. Hence, the advancements made by the IR constructivist literature are, *a priori*, applicable for the understanding of the emergence of a norm of CIL. Nevertheless, there will be a need to differentiate between the emergence of an international norm and a norm of CIL. I proposed that this differentiation be made through the observance of level of formalisation and institutionalisation of the norm. Further, I noted that it would be impossible, in the incipient stages of the life-cycle of a norm, to identify *opinio* in the strict sense of the term. Still, it may be possible to identify a general attitude in the community, and even within the same state. The fragmentary behaviour of the community must be approached neutrally, because it may indicate that the norm in question is acquiring the character of CIL. Finally, I noted that the authority that ascertains the existence of a norm of CIL does not engage in an exercise in sociology, but in a politico-legal exercise that must respect the standards accepted in the community.

⁷⁵ Ibid, Dissenting Opinion of Judge Armand-Ugon.

⁷⁶ Ibid.

⁷⁷ See footnote 59 above.

⁷⁸ For instance, Frederic L. Kirgis, 'Custom on a sliding scale' *American Journal of International Law* (1987) p. 146.

3.4. Internalisation: is it a requirement for the existence and ascertainment of customary international law?

The ascertainment of internalization may become a complex sociological exercise if it looks at the manner that the norm affects the organs of the state *and* other domestic actors.⁷⁹ Consequently, while evidence of strong internalisation would also provide evidence of *opinio* and practice, legal authorities do not need to identify strong internalization to confirm that a norm is CIL.⁸⁰ I argue that the degree of internalisation that is relevant for the confirmation of practice and *opinio* constitutes internalisation by the organs of the state. As the Draft Conclusions explain, ‘State practice consists of conduct of the State, whether in the exercise of its executive, legislative, judicial or other functions’.⁸¹ The Draft Conclusions implicitly apply the same rationale to *opinio*. The IR literature often refers to this level of internalisation as respecting the elites of the States.⁸²

4. THE UN AS AN ARTICULATOR AND PROMOTER OF THE NORM

Among the instruments available for the UN to promote an international norm at the different stages, I highlight norm-entrepreneurship, institutionalization and active socialization.

4.1. Emergence stage: norm-entrepreneurship

The Secretary-General (SG) is frequently described as the norm entrepreneur *par excellence* in the UN system,⁸³ but I argue that others also may function as such, e.g. the High Commissioner for Human Rights and special procedures. Given the limits of this work, focus is placed on the Secretary-General as the chief administrative office of the UN (UN Charter, article 97), who acts in that capacity in all meetings of the other organs, and performs the tasks that they may ascribe to him or her.

The SG enjoys certain autonomy and legal authority that makes him or her a player of weight in the promotion of norms. Indeed, Hammarskjöld argued that, in the spirit of the Charter, the SG is expected to act without guidance from the other organs ‘should this appear to him necessary in order to help in filling a vacuum that may appear in the systems which the Charter and traditional diplomacy provide for the safeguarding of peace and security’.⁸⁴ Likewise, Sheeran makes a powerful case that the SG is ‘normatively and independently constrained under the Charter, including by the

⁷⁹ Jeffrey T Checkel, ‘Why comply? Social learning and European identity change’ 55 *International organization* (2001) p. 553; Harold Hongju Koh, ‘Internalization through Socialization’, *Duke Law Journal* (2005) pp. 975–82; Koh, ‘Why Do Nations Obey International Law?’ 106:8 *The Yale Law Journal* (1997) pp. 2599–2659.

⁸⁰ Similarly, Goodman and Jinks, *Socializing States*, pp. 161 et seq.

⁸¹ ILC Draft conclusions: 5 [6].

⁸² Jeffrey T. Checkel ‘Norms, institutions, and national identity in contemporary Europe’ 43:1 *International Studies Quarterly* (1999) p. 88.

⁸³ Ian Johnstone, ‘The Secretary-General as Norm Entrepreneur,’ in *Secretary or General?: The UN Secretary-General in World Politics*, ed. Simon Chesterman (Cambridge University Press, 2007) pp. 123–38.

⁸⁴ James Cockayne and David Malone, ‘Relations with the Security Council’ in Simon Chesterman (ed), *Secretary or General? The UN Secretary-General in World Politics*, Cambridge University Press (2007) p. 73

Organization's obligations, when implementing the decisions of the Security Council.⁸⁵ The rationale is that the Charter (implicitly) requires the SG to ensure that whichever functions he or she is performing or overseeing remains within the limits of what is legally acceptable under the Charter, the treaties entered into by the UN and general international law as applicable to the UN. Furthermore, insofar as the UN may incur in international responsibility for breaches of international law, the SG has an additional reason to ensure that the activities under his or her responsibility do not cause such breaches.

By ascertaining what is and what is not compatible with the Charter and international law, the SG may in fact be promoting the development of legal rules. Johnstone explains that, because of the managerial and political functions, the SG plays an important role as 'norm entrepreneur', by electing a cause and mobilizing support in order to have it 'crystallized as an accepted standard of behavior'.⁸⁶ Johnstone studies the case of the 'responsibility to protect' norm and, adopting a constructivist approach, demonstrates how Kofi Annan worked to promote it. He concludes that the SG is not a 'normative free agent'; that he or she cannot stretch 'too far from accepted understandings', and that he or she 'succeeds best when he or she joins emerging normative trends [...] rather than trying to generate new norms out of the cloth'.⁸⁷

4.2. Cascade stage: Institutionalization

At the cascade stage, the UN can institutionalise the emergent norm. The obvious instrument for the institutionalisation of international norms is resolutions of the UN political organs. The literature on the subject is significant.⁸⁸ The first question is whether these resolutions are capable of reflecting general – rather than mere UN – customary law. Both Higgins⁸⁹ and Alvarez diminish the weight of the distinction between law of the organization and that of the international community.⁹⁰

⁸⁵ Scott P. Sheeran, 'A Constitutional Moment?: United Nations Peacekeeping in the Democratic Republic of Congo' 8 *International Organizations Law Review* (2011) p. 55.

⁸⁶ Ian Johnstone, 'The Secretary-General as norm entrepreneur' p. 126.

⁸⁷ Ibid.

⁸⁸ Rosalyn Higgins, *The Development of International Law through Political Organs of the United Nations* (Oxford University Press 1963); Obed Asamoah, 'The Legal Effect of Resolutions of the General Assembly.' 3 *Colum. J. Transnat'l L.* (1963) p. 210; Samuel A. Bleicher 'The Legal Significance of Re-Citation of General Assembly Resolutions' 63:3 *The American Journal of International Law* (1969) pp. 444-478; Krzysztof Skubiszewski 'Forms of Participation of International Organizations in the Lawmaking Processes' 18:04 *International Organization* (1964) pp. 790-805; 'Enactment of law by international organizations' 41 *Brit. YB Int'l L.* (1965) p. 198; Constantin Economides 'Les actes institutionnels internationaux et les sources du Droit international' 34:1 *Annuaire français de droit international* (1988) pp. 131-145. Olivier Corten. 'La Participation du Conseil de Sécurité à l'Elaboration, à la Crystallisation ou à la Consolidation de Règles Coutumières' 37 *Rev. BDI* (2004) p. 552; Marko Divac Öberg 'The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ.' 16:5 *European Journal of International Law* (2005) p. 879-906.

⁸⁹ Rosalyn Higgins, *The Development of International Law through Political Organs of the United Nations* p. 3-4. ('How, in practice, do political bodies such as these contribute to the development of international law? These organs are called upon, in the course of their ordinary work, to interpret their own constitution [i.e. the UN Charter]. This constitution not only is an international treaty, but also contains many accepted concepts of international law. Interpretative decisions inevitably must reflect upon the meaning of international law. Moreover, even the decisions on the internal workings of the United Nations, on its constitutional powers under the Charter, ultimately reflect on general international law...').

⁹⁰ J. E. Alvarez, *International Organizations as Law-Makers* (Oxford University Press, 2005), 143-83. (On page 144, he affirms the need to 'de-emphasize the importance of the internal/external distinction and recognize that many if

Accordingly, I de-emphasize this distinction for the task of the identification of *emerging* customary norms.⁹¹

Higgins articulates what is likely the most comprehensive and well-known theory on the manner that resolutions of the UN can promote CIL. She explains that resolutions may, *inter alia*, recommend the adoption of new law; declare existing law, confirm what the law is, notably in case of competing claims, and apply specific law to particular situations.⁹² Given space constraints, it is not possible to look at all these effects in detail. Scholars who looked at the subject tend to agree that resolutions may promote the emergence of new CIL or declare (reflect) existing CIL, which largely coincides with some of the conclusions adopted by the ILC.⁹³ Having said this, there is not agreement in respect to several other aspects – notably, as to whether a resolution may create new law *per se*.⁹⁴ In any case, even when they have recommendatory character, these resolutions trigger the obligation for the states to react in good faith, which in practice may signify that uncompliant states need to justify themselves.⁹⁵ Hence, there is a need to place each resolution in its proper context, and scholars tend to look at the vote tallying and declarations made by the representatives of the states in order to determine said context. However, although necessary, this is insufficient. I argue that the resolution must be properly contextualised within the *practice* – the *operational activities* – of the UN.⁹⁶ Furthermore, I submit that resolutions stating the same norms *do not* necessarily reflect the same stage in the development of these norms. The first of the resolutions in a series of resolutions will hardly constitute the pinnacle of the processes of institutionalization. Different resolutions in the same series may simply constitute milestones in the process of crystallization of a norm as a legal customary norm – early resolutions may simply articulate the norm; later resolutions may clarify its scope, while more mature reflect its full institutionalization.

not most decisions made by IOs have *both* internal and external normative impacts in the sense of affecting both matters once deemed to be within internal administrative law as well as other, ostensibly, more “substantive”, rules of international law’. Then he uses Higgins framework to review more recent cases and concludes [p. 148] that UN organs ‘continue to be law-makers in the sense that Higgins described so well, even if the resulting law has moved in ways that she did not anticipate’)

⁹¹ In contrast, see Michael Wood, “Third Report on Identification of Customary International Law”, para. 72. (‘Another distinction to be made is that between conduct of the organization that relates to the internal operation of the organization ... and conduct of the organization in its relations with States, international organizations and other (external practice). While the former may in certain circumstances give rise to “a kind of customary law of the organization, formed by the organization and applying only to the organization” it is in principle the latter that may be relevant to the *formation* and identification of customary international law’ – my italics).

⁹² Rosalyn Higgins, *The development of international law by the political organs of the United Nations*.

⁹³ ILC Draft conclusions: 12[13] ‘2. A resolution adopted by an international organization or at an intergovernmental conference may provide evidence for establishing the existence and content of a rule of customary international law, or contribute to its development. 3. A provision in a resolution adopted by an international organization or at an intergovernmental conference may reflect a rule of customary international law if it is established that the provision corresponds to a general practice that is accepted as law (*opinio juris*).’

⁹⁴ Contrast the ILA London Statement, para. 32 (‘Resolutions accepted unanimously or almost unanimously, and which evince a clear intention on the part of their supporters to lay down a rule of international law, are capable, very exceptionally, of creating general customary law by the mere fact of their adoption’) with the ILC Draft conclusion 12[13] 1 (‘A resolution adopted by an international organization ... cannot, of itself, create a rule of customary international law’). See, below in the present article, footnote 102 and accompanying text.

⁹⁵ CJR Dugard, “The Legal Effect of United Nation Resolutions on Apartheid” 83 S African LJ (1966) p. 44. See footnotes 51-9 above and accompanying text.

⁹⁶ Similarly, see Ian Johnstone “Law-making through the operational activities of international organizations” 40 *Geo. Wash. Int’l L. Rev.* (2008) p. 87.

4.3. Cascade stage: Active socialization

Besides, the UN may create social pressure on recalcitrant states through compliance-inducing mechanisms.⁹⁷ Among the compliance-inducing instruments that are available to the UN, first I highlight those that aim at clarifying the scope of the norm. In this respect, reports produced by the Secretariat and by many UN procedures have played an important role in clarifying the scope of certain norms. Usually, these reports are prepared under certain mandates established by the main political organs. Second, I underline the instruments that aim at improving the transparency of the state behaviour in respect to the norm, thus, strengthening cultural and social pressures on nonconforming behaviour. Mechanisms of verification and monitoring aim at improving the transparency of the behaviour of the states in respect to the norm.⁹⁸ Verification often aims at identifying delinquent state or non-state actors to enforce obligations upon them. Monitoring aims at assessing overall implementation of legal obligations by those actors with a view to fine-tuning policies in order to increase pressure on nonconforming behaviour. Reporting is an instrument that allows for the UN political organs to review and fine-tune their actions. Its importance goes far beyond the mere account of facts: the reporting organ often enjoys a considerable margin of discretion in defining the problems, framing the range of acceptable solutions, articulating and clarifying norms to address the problems, and establishing an agenda for future action.

There are different reasons for non-compliance; and there are different instruments available for the UN to induce compliance with emerging norms.⁹⁹ Domestic implementation of some norms is more complex and costly than others,¹⁰⁰ which in turn may explain resilience by some organs (e.g. government), while others (e.g. judiciary) push for the adoption of the norm. Complexities and costs also vary geographically and according to the different realities of each state. The assessment of resilience that some states, or some organs of the same state, may have towards the norm must differentiate between their clear-cut rejection of it (e.g. in ethical terms, which may be addressed by persuasion and socialization) or a justified resistance to it, e.g. by the lack of material resources to implement it.¹⁰¹ This type of assessment may help the UN in elucidating the reasons (*opinio juris*) states put forward to justify their behaviour at any given moment. Consequently, the Organization may define the instruments it must employ to change both *opinio* and behaviour. For instance, in the case of lack of resources, material sanctions would not be an appropriate mechanism, but the delivery of technical or material assistance would.

⁹⁷ Abram Chayes and Antonia Handler Chayes, *The New Sovereignty* (Harvard University Press, 1998).

⁹⁸ *Ibid.*, 184.

⁹⁹ *Ibid.*

¹⁰⁰ Virgilio Afonso da Silva, 'Do Treaties Matter – Beth Simmons' Mobilizing for Human Rights: International Law in Domestic Politics (2009)', 13 *German Law Journal* (2012): 85. ('The difficulties in realizing a basic right are directly related to the extension of what is demanded from the state').

¹⁰¹ See generally, Abram Chayes and Antonia Handler Chayes, *The New Sovereignty*. (The authors articulate the notion of 'compliance management', which requires the identification of the reasons for the lack of compliance so as to tackle its causes through the appropriate mechanisms).

Hence, formalisation and institutionalization are continuums that may reflect the progressive crystallization of a norm qua CIL. Hence, as mentioned, the first affirmation of the norm as CIL is likely to occur as the norm is institutionalised, which, in turn, is likely to occur at the stage of cascading. To that extent, I submit that other documents, such as statements by the Presidency of the Security Council and landmark reports by the Secretary-General, may also play the same role. In a broader context, the same may be applicable to the relationship between treaties and emerging custom: earlier treaties may – for the purposes of ascertaining the generation of a customary rule – articulate it, while later treaties reflect its full institutionalization. It is important to note that the rationale above does not work well with the idea that a resolution or even a treaty may *per se* generate CIL.¹⁰² This is because the behaviour and attitude of states must always be ascertained pursuant to the lines articulated above, which is a thesis that is compatible with important conclusions reached by the ILC.¹⁰³

5. THE THEORY IN PRACTICE

In an attempt to give a practical content to the theoretical framework developed earlier, this section very briefly looks at the emergence and evolution of the prohibition of apartheid as CIL. I argue that this norm is at the late stage of internalisation and, consequently, that its study is capable of offering an overview of the application of the theory at the different junctures of its life cycle. Given space constraints, the review is merely illustrative.

In a recent article, Dugard and Reynolds argue that the ‘customary status of the prohibition of apartheid is indicated by its location within general UN efforts aimed at the eradication of all forms of racial discrimination’.¹⁰⁴ I would like to place focus on certain efforts by the General Assembly, Security Council and Secretary-General in promoting and institutionalising the norm, and influencing the behaviour and attitude of states in general.

Apartheid was one of the earliest topics on the agenda of the General Assembly.¹⁰⁵ It was by the initiative of a group formed by India and twelve other

¹⁰² d’Amato, *The Concept of Custom in International Law*, pp. 110 et seq. (Arguing, inter alia, that treaties with generalizable norms, and containing a ‘manifest intent’ to create customary law may indeed create it). However, see Scobbie, “The Approach to International Customary Law in the Study” pp. 32–3. (Rejecting the notion that universal participation in a convention may transmute its provisions into customary law; and affirming that the assessment of the practice in respect to the putative customary norm must be distinguished from compliance with a provision in a treaty [I add, resolution] containing the same norm).

¹⁰³ ILC Draft conclusions: 11[12] and 12 [13].

¹⁰⁴ John Dugard and John Reynolds, ‘Apartheid, International Law, and the Occupied Palestinian Territory’ 24 *European Journal of International Law* (2013) p. 867.

¹⁰⁵ The topic appeared as treatment of people of Indian origin in South Africa. See UNGA, *Resolution 395 (V). Treatment of People of Indian Origin in South Africa. 315th Plenary Meeting. 2 December 1950* (UN 1950). This is a landmark resolution because it clearly stated that apartheid was based on the ‘doctrines of racial discrimination’. The first resolution to address the policies of apartheid was UNGA, *Resolution 616 A-B (VII). The question of race conflict in South Africa resulting from the policies of apartheid of the Government of the Union of South Africa. 401st plenary meeting. 5 December 1952* (UN 1952). From this early date, the GA remained seized of the topic ‘Policies of Apartheid of the Government of South Africa’ until the removal of the topic from its agenda in 1994: UNGA *Resolution 48/258*

countries, which can be considered the leading states, that the involvement of the General Assembly was reinforced.¹⁰⁶ In 1952, the Assembly established the Commission on the Racial Situation on the Republic of South Africa, requesting inter alia that it review the practice of apartheid and its consistency with South Africa's obligations under the Charter.¹⁰⁷ The Commission was composed by three individuals acting in their own capacity. Their first report provided a clear definition of the practices involved with the regime. It also interpreted the human rights provisions in the Charter by resorting to resolutions of the Assembly, notably the Universal Declaration of Human Rights, and concluded that apartheid violated the Charter and, crucially, that it constituted a problem for the whole international community.¹⁰⁸ The report was considered by the Assembly in a 1953 resolution adopted by 38 to 11 votes, with 11 abstentions.¹⁰⁹ The conclusions of the Commission framed the debate and defined the contours of its developments. Thenceforth, it became clear that the contractualist approach to the topic together with the robust principle of domestic jurisdiction, which informed the position of South Africa and recalcitrant states, clashed with the public law, almost constitutionalist approach, which emphasised respect to human rights as a necessary requirement for peace and which informed the position of the leading states and the General Assembly.¹¹⁰ Hence, at the stage of emergence, the GA provided the norm with scope and legitimacy (by clearly linking it to the UN Charter). Note that, at this juncture, it is difficult to define with precision the legal nature of the norm: whether an obligation derived from the Charter or an emergent norm of CIL that drew its legitimacy from the Charter.

As mentioned, the Assembly adopted a series of resolutions condemning apartheid.¹¹¹ These resolutions, together with those of the SC mentioned below, broadened the scope of the operational activities of the UN on the topic and created the institutional framework for the operationalization, clarification and development of the norm prohibiting apartheid as CIL. Indeed, the GA recommended that states adopted an embargo against the Government of South Africa, making it clear that the latter was in violation with a norm of international law.¹¹² Moreover, the GA created a subsidiary organ mandated with the task of monitoring the situation and reporting back to the GA, the so-called *Special Committee against Apartheid*,¹¹³ which functioned as a focal

A-B. *Elimination of apartheid and establishment of a united, democratic and non-racial South Africa*. 95th plenary meeting 23 June 1994 (UN 1994).

¹⁰⁶ UN General Assembly, *Letter dated 12 September 1952 addressed to the Secretary-General by the permanent representatives of Afghanistan, Burma, Egypt, India, Indonesia, Iran, Iraq, Lebanon, Pakistan, Philippines, Saudi Arabia, Syria and Yemen*. Document A/2183. 12 September 1952 (UN 1952).

¹⁰⁷ UN General Assembly, *Resolution 616 (VII). The question of race conflict in South Africa resulting from the policies of apartheid of the Government of the Union of South Africa*. 401st Plenary meeting, 5 December 1952. (UN 1952)

¹⁰⁸ UN General Assembly, *Report of the United Nations Commission on the Racial Situation in the Union of South Africa*. Eight Session Supplement n. 16 (A/2505 & A/2505/Add.I) (UN 1953).

¹⁰⁹ UN General Assembly, *Resolution 721 (VIII). The question of race conflict in South Africa resulting from the policies of apartheid of the Government of the Union of South Africa*. 469th plenary meeting, 8 December 1953. (UN 1953).

¹¹⁰ Sufyan Droubi *Resisting United Nations Security Council Resolutions* (Routledge 2014), chapter 3.

¹¹¹ See footnote 105 above.

¹¹² UNGA, *Resolution 1761 (XVII). The policies of apartheid of the Government of the Republic of South Africa*. 1165th plenary meeting, 6 November 1962 (UN 1962).

¹¹³ Ibid.

point for the clarification of the policies of apartheid (hence, for the clarification of the scope of the norm prohibiting apartheid) and for creating social pressure on the Government of South Africa.¹¹⁴ Also, it requested the SG to provide the necessary assistance to the referred Committee and to monitor specific situations.¹¹⁵ Progressively, the norm gained strength, emerging as customary law.

In what respects the Council, its first resolution on the regime came in 1960, condemning the so called Sharpeville massacre,¹¹⁶ and making it definitely clear that the UN had jurisdiction to review the policies of apartheid. Nevertheless, the Council was late in adopting mandatory coercive measures because the UK and France were adamant that the regime in South Africa respected solely the domestic jurisdiction of the country. Only in 1977 the two countries, under increasingly social pressure from other states, reverted their positions, and the Council was able to adopt sanctions against South Africa.¹¹⁷ In the 1970s and 80s, both the Assembly and the Council condemned several acts carried out by the South African Government, and they went so far as to declare a newly adopted constitution null and void.¹¹⁸ At this point, I argue that the norm prohibiting apartheid was already at the stage of cascading as the more recalcitrant states changed their understanding and opposed apartheid. Ultimately, the Assembly was able to adopt by consensus the 'Declaration on Apartheid and its Destructive Consequences in Southern Africa' paving the way for negotiations to end the regime and establish democracy.¹¹⁹ I submit that this Declaration reflected the standing of the prohibition of apartheid as CIL.

The role of that the SG played in the present case constitutes a counterfactual test in respect to the potential of the SG to serve as norm-entrepreneur.¹²⁰ However, this example does not disprove the ability of the SG to function as norm-entrepreneur; rather, it *clarifies* the scope, the limits of this ability. The main role that the SG played was in response to the request made by the SC. In resolution 134 (1960), the SC requested the SG 'in consultation with the Government of the Union of South Africa, to make such arrangements as would adequately help in upholding the purposes and principles of the Charter'.¹²¹ Responding to this request, the SC at the time, Dag Hammarskjöld, had to deal with a harsh reality. The government of South Africa immediately rejected resolution 134 (1960) on grounds that it constituted an illegitimate

¹¹⁴ See UNGA Resolution 48/258 A (UN 1994), para. 6. Also, Newell M. Stulz 'Evolution of the United Nations Anti-Apartheid Regime' 13 *Human Rights Quarterly* (1991) pp. 11-14.

¹¹⁵ Ibid. See also, the other resolutions in the series 'Policies of Apartheid of the Government of South Africa' (footnote 105, above).

¹¹⁶ UN Security Council, *Resolution 134 (1960). Resolution of 1 April 1960 [S/4300]. Adopted at the 856th meeting by 9 votes to none, with 2 abstentions (France, United Kingdom of Great Britain and Northern Ireland)* (UN 1960).

¹¹⁷ UN Security Council, *Resolution 418 (1977) of 4 November 1977. Adopted unanimously at the 2046th meeting* (UN 1977).

¹¹⁸ UN Security Council, *Resolution 554 (1984) of 17 August 1984. Adopted at the 2551st meeting by 13 votes to none, with 2 abstentions (United Kingdom of Great Britain and Northern Ireland, United States of America)* (UN 1984). UN General Assembly, *Resolution 39/2. Situation in South Africa. 13th plenary meeting. 28 September 1984* (UN 1984).

¹¹⁹ UN General Assembly, *Sixteenth Special Session. II. Resolution adopted on the report of the Ad Hoc Committee of the Whole of the Sixteenth Special Session. S-16/1. Declaration on Apartheid and its Destructive Consequences in Southern Africa. 6th plenary meeting. 14 December 1989* (UN 1989)

¹²⁰ Section 4.1 above.

¹²¹ UNSC Resolution 134 (1960), para. 4.

intromission in the domestic jurisdiction of that country.¹²² This left Hammarskjöld with no alternative but that of resorting to the so-called Peking formula.¹²³ Consequently, he was in a position closer to that of a mediator,¹²⁴ who had to rely on quiet diplomacy.¹²⁵ I submit that this was inconsistent with open, vocal norm-entrepreneurship. Because of the low profile role that he adopted, Hammarskjöld was able to establish a channel of communication with the Government of South Africa: he was the first SG to visit the country,¹²⁶ though under a severe restriction of movement.¹²⁷ In these circumstances, the fact that Hammarskjöld managed to convey the message that apartheid was contrary to the Charter and that the UN had jurisdiction over the issue is telling of his ability to promote a norm even when facing little room to act.¹²⁸

This very brief case study suggests that the Assembly is capable of affecting the development of a norm through its resolutions and operational activities. Without clarifying the practices involved in apartheid, and defining that the regime constituted a problem for the whole international community, the prohibition could never evolve into law. Resolutions of the Assembly were capable of materialising sound legal approaches to a topic that, in the 1950s and 60s, was not object of agreement among the states. These resolutions became focal points for the development of the debate, and insofar as they articulated the prohibition of apartheid, they paved the way for the norm to become stronger. Another aspect that the study suggests refers to the socialisation, and the creation of social pressure on recalcitrant states. The monitoring of the situation by the Special Committee against Apartheid and by the Secretary-General was important to give salience to the widespread violations of human rights carried by the South African Government, which increased politicisation and reinforced social pressure.

Furthermore, the study clarifies that the role of norm-entrepreneur is not fully compatible with other functions that the SG may have: insofar as the SG is involved with mediation and quiet diplomacy, it may be very difficult, if not impossible, to engage in open norm-entrepreneurship. What is more, the study helps clarify the methodology appropriate for the development of future case-studies. There is a need to clearly identify the norm subject of the case study and establish its genealogy. This

¹²² UNSC *Official Records Fifteenth Year 851th Meeting: 30 March 1960* (UN 1960) S/PV.851 (1960) p. 8. Sufyan Droubi *Resisting United Nations Security Council*, chapter 3.

¹²³ Kent J Kille, *From Manager to Visionary - The Secretary-General of the United Nations*, Palgrave Macmillan (New York 2006), 110. On the Peking formula, see Mark W Zacher *Dag Hammarskjöld United Nations* Columbia University Press (New York 1970), 128 ('The essence of this formula was that when a state does not recognize the authority of a resolution of the Security Council of the General Assembly which the Secretary-General has been asked to try to implement, he can request and undertake negotiations under his independent diplomatic powers flowing from the Charter rather than under the authority of the resolution').

¹²⁴ Tor Sellström 'Hammarskjöld and apartheid South Africa: mission unaccomplished' 11:1 *African Journal on Conflict Resolution* (2011) p. 48.

¹²⁵ Chris Saunders 'Hammarskjöld's visit to South Africa.' 11:1 *African Journal on Conflict Resolution* (2011) p. 31.

¹²⁶ Tor Sellström 'Hammarskjöld and apartheid South Africa: mission unaccomplished' p. 40.

¹²⁷ *Ibid* p. 44.

¹²⁸ Tor Sellström 'Hammarskjöld and apartheid South Africa: mission unaccomplished'; Chris Saunders 'Hammarskjöld's visit to South Africa.'

involves tracking the resolutions that affirm it and the reports in which the norm is interpreted and clarified. It also involves placing the norm in its legal context, i.e., in reference to other norms. In the case study examined here, the strengthening of the prohibition meant the weakening of the domestic jurisdiction principle. It is also necessary to review the institutionalisation efforts carried out by the UN, such as the establishment of committees whose activities provide practical meaning to the norm. Furthermore, it is necessary to ascertain the compliance inducing instruments employed by the UN and the variations of material compliance and attitude of the states that they effectively trigger.

6. CONCLUSION

To summarize the main arguments suggested in this study, I need to refer to Allot's argument that law has three functions in society.¹²⁹ It transports society through time; it connects the individual behaviour of the members with the common interest of society; and it frames the range of possible futures for society. A society constitutes itself through law (the legal constituting), ideas (the ideal constituting) and the behaviour of its members (the real constituting). Allot asserts that constituting the legal society *affects* the constituting of the ideal and real societies, as much as *it is affected* by the latter. Therefore, law needs a society that has structures and systems, which enable the 'mutual conditioning' of the public and the private minds, and the legal and non-legal.¹³⁰ Constructivism offers the most convincing account of these processes because it claims that the normative, ideational and material structures of a society all shape the behaviour, identities and interests of its actors, states and non-state alike. The normative and ideational structures rely on the habitual practices of those actors, who are informed social agents and, consequently, those structures are open to transformation. The identities of the actors are social constructs because they are *learned* by the actors; identities are not givens: they are endogenous to the social processes and vary pursuant to the continued learning by the actors. Consequently, interests and behaviour also vary. Hence, understanding the actors' behaviour depends on understanding how social identities affect both interests and action.¹³¹

In this framework, the UN emerges as more than a simple agent of the states. It is capable of defining problems and articulating, introducing and promoting norms, and of affecting the behaviour and attitude of the states. The lines between *lex lata* and *lege ferenda*, and between law of the Organization and that of the international community, may blur as emerging norms become stronger, and as they merge and reinforce each other. As explained, there is fluidity between non-law and law, and law of the organization with that of the community. Rather than searching for coherent behaviour in respect to an emerging norm of CIL, it may be more revealing to search for ambivalent behaviour that suggests that the norm is progressively emerging and

¹²⁹ Philip Allott, 'The Concept of International Law' 10 *European Journal of International Law* (1999) p. 31.

¹³⁰ Ibid.

¹³¹ Christian Reus-Smit, *The politics of international law* pp. 21–3.

progressively being used as CIL. It is necessary to look at the manner that general attitude changes in respect to the behaviour that the norm authorizes, commands or prohibits.

Consequently, the sociological, constructivist approach adopted in this work is capable of better explaining the *formation* of CIL, in contrast with the more formalist and state-centred approach adopted by the SR and the ILC. Granted, the latter is concerned with the *identification* of CIL – however it is not possible to clearly differentiate between emerging and extant CIL. Consequently, some of the conclusions that the ILC reaches may jeopardise the identification of emerging norms or make the exercise more cumbersome. This is the case of the formal separation of the ascertainment of identification of practice and opinio,¹³² the decrease of the importance of inconsistent practice and opinio,¹³³ and, above all, the extremely cautious approach to international organizations, and non-state actors in general.¹³⁴ In concluding this article, I suggest that further research should look at the topic of the institutionalisation of emerging norms, and how the UN may foster the emergence of new CIL by establishing institutional frameworks. In looking at this topic, one must bear in mind that resolutions must be studied within the operational activities of the Organization.

¹³² ILC Draft conclusions: 3[4] 1.

¹³³ ILC Draft conclusions: 7[8] 2.

¹³⁴ ILC Draft conclusions: 4[5] 2 and 3.